HAI YUE HIN

v.

PUBLIC FEEDMILL (M) SDN BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
ABDUL MALEK AHMAD JCA
DENIS ONG JCA
[CIVIL APPEAL NO: W-02-758-95]
8 SEPTEMBER 1997

CIVIL PROCEDURE: *Costs - Discretion of court - Interlocutory proceedings - Whether costs may be paid forthwith - Whether only payable after conclusion of proceedings - Rules of the High Court 1980, O. 59 r. 4(1)*

The respondent filed a summons in chambers for summary judgment under O. 14 of the Rules of the High Court 1980 ('the RHC') in respect of its claim against the appellant. The senior assistant registrar dismissed the application with costs. The respondent then filed a notice of appeal to the judge in chambers and this appeal was dismissed with costs as well. The appellant then filed a notice of taxation of the costs awarded by the senior assistant registrar. At the hearing of the notice, counsel for the respondent raised the preliminary objection that the notice of taxation was made pursuant to an interlocutory application and that the appeal in respect of that interlocutory application was pending. The senior assistant registrar upheld the preliminary objection and ordered that the notice of taxation be heard after the conclusion of the proceedings. The appellant then appealed to the judge in chambers. The judge agreed with the decision of the senior assistant registrar and dismissed the appeal with costs. The appellant then appealed to the Court of Appeal.

Held:
Per Shaik Daud Ismail JCA

[1] The question of costs is left to the discretion of the court. If the court thinks it fit it may order the costs to be paid forthwith; otherwise it should follow the general rule in interlocutory proceedings and order costs to be paid only after the conclusion of the proceedings. The operative words in O. 59 r. 4(1) are 'may if the Judge thinks fit'. If the judge finds sufficient evidence to justify an order of costs to be paid forthwith, then if he thinks it fit he will make such an order.

[Appeal dismissed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Kos - Prosiding interlokutori - Notis penetapan - Bantahan awal - Rayuan permohonan interlokutori menanti penyelesaian - Samada kos hendaklah dibayar segera - Aturan 59 k. 4(1) Kaedah-kaedah Mahkamah Tinggi 1980 - Budibicara mahkamah*

Responden telah memfailkan saman dalam kamar untuk mendapatkan penghakiman terus di bawah A. 14 Kaedah-kaedah Mahkamah Tinggi 1980 berhubung dengan tuntutan mereka terhadap perayu. Penolong Kanan Pendaftar telah menolak permohonan tersebut dengan kos. Responden kemudiannya telah memfailkan notis rayuan kepada hakim dalam kamar dan rayuan ini juga telah ditolak dengan kos. Perayu sebaliknya, telah memfailkan satu notis penetapan kos yang telah diawardkan oleh Penolong Kanan Pendaftar. Di perbicaraan notis itu, peguam bagi pihak responden telah membangkitkan satu bantahan awal bahawa notis penetapan itu telah dibuat selaras dengan satu permohonan interlokutori dan bahawa rayuan berhubung dengan permohonan interlokutori itu masih menantikan penyelesaian. Penolong Kanan Pendaftar telah bersetuju dengan bantahan awal tersebut dan telah memerintahkan supaya notis penetapan tersebut di dengar selepas penamatan prosidintg tersebut. Perayu kemudiannya telah merayu kepada hakim dalam kamar. Hakim telah bersetuju dengan keputusan Penolong Kanan Pendaftar dan telah menolak rayuan tersebut dengan kos. Perayu kemudiannya merayu kepada Mahkamah Rayuan.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Persoalan kos hendaklah dibiarkan atas budibicara mahkamah. Jika mahkamah memikirkan ianya sesuai, maka ianya boleh memerintahkan supaya kos dibayar segera; jika sebaliknya ianya haruslah mengikuti kaedah am dalam prosiding interlokutori dan dibayar hanya selepas penamatan prosiding tersebut. Perkataan-perkataan operatif dalam A. 59 k. 4(1) adalah "boleh jika Hakim fikirkan ianya sesuai". Jika Hakim mendapati keterangan yang mencukupi untuk mewajarkan satu perintah dibayar segera, maka jika beliau memikirkannya sesuai beliau akan membuat perintah yang sedemikian.

[Rayuan ditolak dengan kos.]

Cases referred to:

Adam & Harvey Ltd v. International Maritime Supplies Co Ltd [1967] 1 All ER 533 ***(not foll)***

Allied Collection Agencies Ltd v. Wood & Anor [1981] 3 All ER 176 ***(not foll)***

The East Asiatic Co (M) Bhd v. Kilang Papan Aman Sdn Bhd; High Court Malaya, Kuala Lumpur; Civil Suit No 2157 of 1985 (unreported) ***(not foll)***

Chow Yong Hong v. Chow See Lim & Anor [1959] 25 MLJ 23 ***(foll)***
Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg) Bhd [1990] 1 MLJ 304 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 59 r. 4(1)
Rules of the Supreme Court [UK], O. 62 r. 4(1)

[Appeal from High Court Malaya, Kuala Lumpur; Suit No: D3-23-2633-88]

For the appellant - Wong Kim Lin; M/s KL Wong & Lim
For the respondent - VS Viswanathan; M/s TH Su & Co

JUDGMENT

Shaik Daud Ismail JCA:

On 19 January 1990 the respondent (plaintiff) filed a summons in chambers for summary judgment under O. 14 of the Rules of the High Court 1980 for their claim against the appellant (defendant). The matter came up for hearing before the Senior Assistant Registrar on 9 April 1992 and the application was dismissed with costs. Thereafter on 13 April 1992 the respondent filed notice of appeal to the judge in chambers which appeal was dismissed with costs on 22 February 1994. The learned judge, however, granted leave to the respondent to appeal but no appeal was ever filed. On 18 July 1992 the appellant filed a notice of taxation of the costs awarded by the learned Senior Assistant Registrar on 9 April 1992. At the hearing of the notice in question on 8 March 1993, learned counsel for the respondent raised a preliminary objection to the effect that the notice of taxation was made pursuant to an interlocutory application and that the appeal in respect of that interlocutory application is pending. The learned Senior Assistant Registrar agreed with the preliminary objection and ordered that the notice of taxation be heard after the conclusion of the proceedings. The appellant being dissatisfied with the said order appealed to the judge in chambers. After hearing arguments the learned judge agreed with the decision of the learned Senior Assistant Registrar and dismissed the appeal with costs. Hence this appeal to this court.

The issue both in the High Court and this court is in the interpretation of O. 59 r. 4(1) of the Rules of the High Court 1980 which provides:

> 4(1). Costs may be dealt with by the Court at any stage of the proceedings; or after the conclusion of the proceedings and any order of the Court for the payment of any costs may, if the Court thinks fit, require the costs to be paid forthwith notwithstanding that the proceedings have not been concluded.

Learned counsel for the appellant cited two English authorities in support of her contention that the proper interpretation of O. 59 r. 4(1) is that when the court ordered costs to a party even in an interlocutory matter, such costs are to be paid forthwith, and not after the conclusion of the proceedings. The heavy reliance on these two cases is because the English Order which governs this is O. 62 r. 4(1) which is in *pari materia* with our O. 59 r. 4(1). In *Adam & Harvey, Ltd. v. International Maritime Supplies Co. Ltd.* [1967] 1 All ER 533 it was held that in an interlocutory matter orders for costs to be taxed made without stating "forthwith" confers a right to immediate taxation. In *Allied Collection Agencies Ltd. v. Wood & Anor.* [1981] 3 All ER 176 it was held:

> When on an interlocutory application the court intends that one party is to have the costs of that application irrespective of the outcome of the substantive action, the usual form of order is "costs in any event", in which case the taxation is deferred until the conclusion of the substantive action. The words "defendant's costs" and the words "plaintiff's costs" which are only used in exceptional circumstances have the effect of entitling the party concerned to obtain an immediate taxation.

Learned counsel for the appellant urged upon us to follow these two English authorities especially when the English Order on the issue is in *pari materia* with our O. 59 r. 4(1). She also cited an unreported decision of Shankar J, (as he then was) in *The East Asiatic Co. (M) Bhd. v. Kilang Papan Aman Sdn. Bhd.* in Kuala Lumpur High Court Civil Suit No. 2157 of 1995.

That case also concerns the dismissal by the Senior Assistant Registrar of an interlocutory application with costs. When an application for taxation of the costs came up before the Senior Assistant Registrar and on an objection by the respondent, the learned Senior Assistant Registrar ordered that the bill should only be taxed at the conclusion of the trial. On appeal, Shankar J. (as he then was) following the decisions in *Adam* and *Allied (supra)* held that:

> Upon consideration of these authorities, I am left in no doubt now that the only interpretation of the Registrar's order, "dismissed with costs" is that the costs were to be taxed and paid forthwith.

On our reading of O. 59 r. 4(1) we find that the intention of this rule is as clear as day. The rule itself indicates that the question of costs is left to the discretion of the court and also provide that the court "may, if the court thinks fit require the costs to be paid forthwith". Surely these words must mean what they say. If the court thinks it fit, the court itself would order the costs to be paid forthwith and in the absence of such an order, it should follow the general rule of interlocutory proceedings and the costs should only be paid after the

conclusion of the proceedings. This interpretation does not seem to be a novel one, as some thirty years ago Smith J in *Chow Yong Hong v. Chow See Lim & Anor.* [1959] 25 MLJ 23 held that:

> The proceedings were purely interlocutory and should follow the general rule of interlocutory proceedings and that the costs should be settled at the end of the action.

In interpreting O. 59 r. 4(1), the operative words must be "may if the judge thinks fit". If the judge finds evidence sufficient to justify an order of costs to be paid forthwith, then if he thinks it fit he would make such an order. For instance in dismissing an application for summary judgment under O. 14, if there is evidence to suggest that the plaintiff, in the opinion of the judge, knew that the defendant relied on a contention which would entitle them to unconditional leave to defend, then the judge could and should in our opinion, order that the costs be paid forthwith. The decision in *Chow Yong Hong v. Chow See Lim & Anor. (supra)* was adopted by Mohamed Dzaiddin J (as he then was) in *Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotels (Pg.) Bhd.* [1990] 1 MLJ 304. In dismissing an intertocutory application by the defendant the court ordered cost to the plaintiff without adding the word "forthwith". The learned judge held that where the proceedings were purely interlocutory, the general rule was that costs of the proceedings should be settled at the end of the action. The court further ordered that the costs of interlocutory proceedings should only be made payable forthwith or in any event when the party against whom the order has been made has been guilty of oppressive or unreasonable conduct, or the party has taken unnecessary or improper action.

Having given our utmost consideration to the arguments and the authorities cited, we agree and adopt the interpretation given in the two decisions in *Chow Yong Hong* and *Ko Ko Ma Pony Horse Centre*, as being the more proper and true interpretation of O. 59 r. 4(1). To hold otherwise would make nonsense of the wording of the Order itself which, as stated earlier, is clear as day. It is only when the court thinks it fit to order the costs to be paid by the plaintiff forthwith that it should be so paid, otherwise it should follow the general rule in interlocutory proceedings and be paid only at the conclusion of the action. In the present case, we agree with the decision of the learned judge that nowhere is there any suggestion that the learned Senior Assistant Registrar intended the costs to be paid forthwith. We, therefore dismiss the appeal with costs and ordered the deposits to go to the respondent to account of costs.

Reported by Bernadette Soosai